BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TERESA CABRAL	)	
Claimant	)	
	)	
VS.	)	
	)	
SCHWAN'S FOOD MANUFACTURING, INC.	)	
Respondent	)	Docket No. 1,037,672
	)	
AND	)	
	)	
HARTFORD INS. CO. OF THE MIDWEST	)	
Insurance Carrier	)	

ORDER

Respondent and its carrier (respondent) request review of the May 1, 2008 preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore.

ISSUES

The Administrative Law Judge (ALJ) granted claimant's request for medical care. In doing so, he explained:

> The act of bending over, in the course of performing her normal work duties, constitutes "personal injury by accident arising out of and in the course of" her employment where that act aggravated a pre-existing condition of degenerative disc disease in [c]laimant's lumbar spine.[1]

The respondent argues the ALJ erred and asserts that the act of merely bending over is an activity of day-to-day living. Thus, compensability is prohibited under K.S.A. 44-508(e). Respondent asks the Board to reverse the ALJ's Order and deny all benefits.

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[1] ALJ Order (May 1, 2008).

Claimant argues that the nature of her work, which necessarily requires her to repetitively bend and stoop during her work shift, takes her actions on the day of her injury outside the "day to day" living exception to compensability. Thus, the ALJ's preliminary hearing Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Undersigned Board Member makes the following findings of fact and conclusions of law:

On September 28, 2007, claimant was performing her normal work duties as a break room attendant in respondent's cafeteria. At one point during her shift, she bent down to pick up a pan and she immediately felt pain in her low back. Claimant was unable to stand back up and a co-worker called for the plant nurse. Her condition did not improve and she eventually left work that day. Respondent was unwilling to provide medical treatment or pay temporary total disability (TTD) benefits as it concluded claimant's was a personal condition, wholly unrelated to work.

Claimant's chiropractor, Dr. Ronald Young, examined her back and recommended an MRI. The MRI revealed mild degenerative disc disease as well as mild disc bulges in the lumbar region of the spine.[2] Claimant has yet to receive significant treatment to her back and has remained off work since September 28, 2007. Respondent's unwillingness to provide her with benefits prompted a preliminary hearing and now, this appeal.

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends." K.S.A. 2007 Supp. 44-508(g) finds burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[3] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[4]

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[2] Willis Depo., Ex. E.

[3] K.S.A. 2007 Supp. 44-501(a).

[4] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[5]

Here, there is no dispute that claimant's injury occurred while she was "in the course of" her employment as she was working at her normal duties at the time she suffered her low back injury. The decisive issue is whether her low back complaints amount to an accidental injury that arose "out of" her employment.

K.S.A. 2007 Supp. 44-508(d) defines "accident":

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.

K.S.A. 2007 Supp. 44-508(e) defines "personal injury" and "injury":

> "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

The foregoing statute, which defines "injury" excludes "normal activities of day-to-day living" from being found to have been caused by the employment. In the past, the Board has concluded that the exclusion of normal activities of day-to-day living from the

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[5] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995)

definition of injury was an intent by the Legislature to codify and strengthen the holdings in *Martin*[6] and *Boeckmann.*[7]

The Court in *Boeckmann* distinguished cases in which "the injury was shown to be sufficiently related to a particular strain or episode of physical exertion" to support a finding of compensability.[8] The Board concludes that the Legislature did not intend for the "normal activities of day-to-day living" to be so broadly defined as to include injuries caused or aggravated by the strain or physical exertion of work.

Unfortunately, the Act does not define the phrase "normal activities of day-to-day living." Attempting to provide that phrase with a reasonable interpretation, the Board has previously held that K.S.A. 1999 Supp. 44-508(e) is a codification of the *Boeckmann* decision where the Kansas Supreme Court denied benefits as Mr. Boeckmann's arthritic condition progressively worsened regardless of his activities. The Court said:

> . . . there is no evidence here relating the origin of claimant's disability to trauma in the sense it was found to exist in *Winkelman*. No outside thrust of traumatic force assailed or beat upon the workman's physical structure as happened in *Winkelman*.[9]

More recently, the Court of Appeals again took up this issue in *Johnson,*[10] a case that respondent maintains is analogous to the instant set of facts. In *Johnson*, the claimant was sitting at her desk performing her normal work duties. She turned and reached for a book and immediately suffered pain in her knee. Claimant suffered ongoing knee problems and the medical testimony within that case indicated that the claimant's bucket handle tear in her knee was inevitable due to years of degeneration and previous problems. Simply put, the fact that her knee was injured while working was viewed as a coincidence and an activity of day-to-day living that could just as easily have happened elsewhere than at work. In that instance, the injury was not fairly traceable to her work activities.

The ALJ found that claimant's work activities of bending over constituted a "personal injury by accident arising out of and in the course of" her employment. He specifically

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[6] *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 615 P.2d 168 (1980).

[7] *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

[8] *Id.* at 737.

[9] *Id.* at 736.

[10] *Johnson v. Johnson County*, 36 Kan. App. 2d 786, 147 P.3d 1091, *rev. denied* 281 Kan. __ (2006).

found that the act "aggravated a pre-existing condition of degenerative disc disease" in her lumbar spine.[11]

This member of the Board has considered the parties' arguments and the evidence and concludes the ALJ's Order should be affirmed. Claimant's job duties required her to bend and reach, picking up pans of food, picking up large trash cans and cleaning off tables. While these job tasks are the same that one might have to do at home, claimant was repetitively performing these tasks, lifting trash cans and pans that weighed more than one would find in a normal home. And unlike *Johnson*, claimant did not have any longstanding back complaints. From time to time she had back pains but she did not have the pre-existing symptomatic history that was present in *Johnson*, nor is there any medical testimony about the inevitability of her low back complaints and the sheer coincidence that those complaints manifested while working.

This claim is more consistent with the facts in *Anderson*[12] where the claimant, an individual with a preexisting degenerative back condition, installed convertible tops, headliners and carpets, a job that required him to get in and out of automobiles as much as 20-30 times per day. There, the Court of Appeals noted that the claimant's condition was the result of a personal degenerative condition but also from a hazard of his employment.[13]

Like the claimant in *Anderson*, claimant had a degenerative condition in her back and the condition spontaneously worsened as she bent down to pick up a pan, an act that she was required to do on a repetitive basis. Like the ALJ, this Board Member concludes that claimant suffered an accidental injury arising out of her employment.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[14] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Bruce E. Moore dated May 1, 2008, is affirmed.

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[11] ALJ Order (May 1, 2008).

[12] *Anderson v. Scarlet Auto Interiors*, 31 Kan. App. 2d 5, 61 p.3d 81 (2002).

[13] *Id.* at 11.

[14] K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of June, 2008.

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JULIE A.N. SAMPLE
BOARD MEMBER

c: D. Shane Bangerter, Attorney for Claimant
Mickey W. Mosier, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge